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No. 90-1443

In The

Supreme Court of the United States

October Term, 1990

HERBERT C. SAVAGE,

Petitioner,

vs.

TRAMMELL CROW COMPANY, INC. AND HERITAGE SECURITY SERVICES, INC.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California Fourth District, Division One

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

This case does not involve Petitioner's First Amendment rights under the United States Constitution, as the Petition suggests, but rather Petitioner's free speech and petition rights under Article I, Section 2(a) of the California Constitution. The questions presented are:

1.-2. May a privately owned shopping center ban leafletting in the center's parking lot, where the ban is found to be consistently applied, content neutral and narrowly tailored to protect the center's interests?

3.-5. Must a trial court judge be disqualified because he is a member of the Roman Catholic Church?

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OPINIONS BELOW

The Opinion of the Court of Appeal of the State of California, Fourth district, Division One is reported at 223 Cal.App.3d 1562, with the Modification of Opinion reported at 224 Cal.App.3d 1637a. These are set forth in Appendices A and B of the Petition. The California Supreme Court's en banc denial of the Petition for Review is set forth in Appendix D of the Petition. The orders of the Superior Court of California, County of San Diego, are not reported but are set forth in Appendices E, F and G to the Petition.

JURISDICTION

Respondents contest that jurisdiction of this Court is appropriate under 28 U.S.C. §1257 since the Petition does not seek review of a final judgment or decree and does not raise a substantial Federal Question. (See "Reasons for Denying the Writ", Sections 1 and 3.)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

California Constitution. Article I, Section 2(a).

California Statutes. Code of Civil Procedure Section 170.2.

These provisions are set forth in Appendix H to the Petition.

STATEMENT OF THE CASE

Respondents manage Del Norte Plaza, a privately owned and operated shopping center located in Escondido, California.[1] Del Norte Plaza was privately developed, without any financial assistance from any governmental entities.

Del Norte Plaza is not a major regional mall, but is a small to mid-size center with a gross leasable area of approximately 215,000 square feet. It is situated upon approximately 18.5 acres. Del Norte Plaza's major tenants include a supermarket, drug store, movie theater, dime stores, several restaurants, and 40 smaller retail shops. Automobile parking facilities make up the balance of the shopping center.

The parking facilities of Del Norte Plaza are typical of small centers. Trash containers are located in walkways adjacent to stores but are not located on the parking facilities.

Del Norte Plaza adopted and has consistently enforced certain "Rules and Regulations Relating to the Use of Shopping Center Property for Purposes of Political Expression" (hereafter "Rules"). The Rules provide, and have been *uniformly enforced*, to prohibit the distribution

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[1] Respondent TRAMMELL CROW COMPANY (improperly designated by Petitioner as TRAMMELL CROW COMPANY, INC.) is the dba of Crow San Diego Asset Management Company; Respondent HERITAGE SECURITY SERVICES (improperly designated by Petitioner as HERITAGE SECURITY SERVICES, INC.) is the dba of RICHMAN MANAGEMENT CORPORATION, a California corporation.

of all leaflets, flyers and handbills *in the parking lot*, regardless of the nature or content of the leaflets.

The California Court of Appeal Opinion emphasized facts in the record that demonstrated that Respondents had consistently enforced this reasonable regulation to minimize littering (as there are no trash containers in the parking lot), to preclude undue interference with ingress and egress to the center, to avoid interruptions to automobile traffic patterns (particularly if several individuals were distributing leaflets), to prevent inconvenience to the center's patrons, and to preclude the potential increase in occurrence of traffic accidents on the property. The record further demonstrated that the regulation previously had been enforced by Respondents to compel *a tenant* of the shopping center to stop distributing leaflets, *related to the purposes of the shopping center*, in the parking lot.[2]

On May 25, 1989, Petitioner entered onto Del Norte Plaza and commenced distributing leaflets in the parking lot without seeking permission from Respondents. Petitioner was handling leaflets to people sitting in their cars and placing them on cars if the cars were unoccupied. Petitioner was stopped by Respondents' security guard and subsequently told by Respondents' property manager that he would not be permitted to distribute leaflets in the shopping center parking lot.

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[2] The Court of Appeal also noted facts in the record which indicated that the Rules did not purport to prohibit leafletting, by any person or entity, on the shopping center sidewalks.

Thereafter, on June 2, 1989, Petitioner sought mandatory injunctive relief to preclude Respondents from interfering with Petitioner's distribution of leaflets in the parking lot of the private shopping center.

The trial court denied Petitioner's request for a Temporary Restraining Order, and after a hearing on Petitioner's Order to Show Cause for Preliminary Injunction, issued an Order Denying Preliminary Injunction.

In the interim, Respondents demurred to the Complaint. The trial court sustained Respondents' Demurrer without leave to amend and dismissed Petitioner's Complaint in its entirety.

The Court of Appeal affirmed the trial court's Order Denying Preliminary Injunction but reversed the Order sustaining the Demurrer without leave to amend and dismissing the Complaint.

The California Supreme Court declined to review the Court of Appeal's decision.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Decisions of the Courts Below Involved a Determination of Petitioner's Free Speech and Petition Rights Under Article I, Section 2(a) of the California Constitution, and Not Petitioner's First Amendment Rights; Therefore, the Petition Fails to Raise a Substantial Federal Question.

In *Lloyd Corp. v. Tanner*, 407 U.S. 551, 33 L.Ed.2d 131, 92 S.Ct. 2219 (1972), this Court ruled that a privately owned and operated shopping center may uniformly ban the distribution of handbills on the center's property. In

so ruling, this Court rejected the argument that because a shopping center was "open to the public," the First Amendment of the United States Constitution prevents a private owner from enforcing a prohibition of handbilling. *Id.*, at 564.

In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 64 L.Ed.2d, 741, 100 S.Ct. 2035 (1980), the Court reaffirmed its holding in *Lloyd* regarding the scope of the First Amendment. However, the Court further held that *Lloyd* did not preclude California from adopting and interpreting its own Constitution so as to grant individual liberties more expansive than those under the United States Constitution. This included a provision of the California Constitution which the California Supreme Court had held protects certain free speech and petition rights of California citizens, even when those rights are exercised in a privately owned shopping center.

The instant case involves the exercise of Petitioner's free speech and petitioning rights created *by the California Constitution*. As the two cases of this Court cited above make clear, the First Amendment to the United States Constitution does not provide Petitioner with any right to engage in leafletting activity on Respondents' private property. Accordingly, presentation of a substantial Federal Question, a basic prerequisite for jurisdiction under 28 U.S.C. § 1257, is lacking.[3]

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[3] Petitioner relies heavily upon *Carreras v. City of Anaheim* (9th Cir. 1985) 768 F.2d 1039, to support his contention that he has been denied free speech rights that are afforded to others in California. However, *Carreras* was based on the Ninth

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2. The Decisions of the Courts Below are Consistent With This Court's Holding in *Pruneyard v. Robins* and Reconsideration of That Decision is Unwarranted.

As noted above, *Pruneyard Shopping Center v. Robins* rejected a shopping center owner's argument that *Lloyd Corp. v. Tanner* prevents California from requiring a private shopping center owner to provide access to persons exercising state constitutional rights of free speech and petition. 447 U.S. at 80-81. In reaching this conclusion, however, this Court emphasized that under Article I, Section 2(a) of the California Constitution, the shopping center owner "may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." *Id.*, at 83.

In the instant case, the California Court of Appeal determined, after detailed inquiry into the record, that Respondents' content neutral and narrowly drawn ban on activities such as Petitioner's constituted a valid time, place and manner regulation under the California Constitution. (Pet. A12-A13.) Hence, the California Court of Appeal's decision is entirely consistent with this Court's

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Circuit's analysis and interpretation of the California Constitution and California law, and the court expressly held that there was no need to determine whether petitioner's claim in that action violated the Federal Constitution. *Id.*, at 1042-1043. Moreover, even if a federal constitutional issue existed in the instant case, *Carreras* reaffirms the doctrine that federal constitutional issues should be avoided if a case can be decided on state law grounds. *Id.* Since Petitioner's most expansive speech rights exist under the State Constitution, there is no need to address a Federal Question, if any exists.

holding in *Pruneyard v. Robins*. Moreover, any decision that would force Respondents to open up the parking lot to leafletting activity like Petitioner's would violate the rights afforded to Respondents under *Pruneyard v. Robins*.

3. Jurisdiction Is Lacking Under 28 U.S.C. § 1257 Since Petitioner Does Not Seek Review of a Final Judgment.

Procedurally, this case is in its preliminary stages. The California Court of Appeal has rendered an interlocutory ruling, which among things, allows Petitioner to try to amend his Complaint to allege a claim against Respondents.

The general rule is that, to be reviewable, the state court decision "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945). In sum, an appealable judgment "should be final not only as to all the parties, but as to the whole subject matter and as to all causes of action involved." *Collins v. Miller*, 252 U.S. 364, 370 (1920).

Where a dismissal of a state civil law action has not been ordered, or where leave to amend or answer has been granted, the finality requirement has been found lacking. *McComb v. Commissioners*, 91 U.S. 1 (1876); *Missouri and Kansas R. Co. v. Oletha*, 222 U.S. 185 (1911).

While in the past few decades, the Court has made some significant departures from the literal and traditional concepts of finality, those exceptions are not applicable to the instant case. See, e.g., *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963); *Construction Laborers v. Curry*, 371 U.S. 542, 548-52 (1963); *Cox Broadcasting Corporation v. Cohen*, 420 U.S. 669, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). These authorities essentially reconstruct 28 U.S.C. § 1257 so as not to deny finality where further proceedings are either: (1) meaningless, insofar as preserving Federal Questions are concerned; or (2) present a real danger of some irreparable injury to federal policies or constitutional concerns.

Neither factor is present in the instant case since: (1) no substantial Federal Question is raised by the lower court's decision; and (2) further proceedings are not meaningless, since they may very well result in a substantial change to the nature of the claims, evidence and defenses.

Accordingly, the finality requirement of 28 U.S.C. § 1257 has not been satisfied and jurisdiction is lacking in the instant case.

4. The Challenged Decisions Below are Clearly Correct.

The fundamental issue presented and addressed by the California courts in this matter was whether Respondents' uniformly enforced ban on Petitioner's parking lot leafletting activity is a valid time, place and manner

regulation of activity otherwise protected under *the California Constitution*. The particular facts of this case concerned the application of a specific ban on specific activities (Petitioner's distribution of leaflets in the parking lot) at a specific location (Respondents' private property.) The decision denying Petitioner's request for an injunction was the result of the California courts engaging in an inquiry into, and determination of, factual showings made by the parties. (See, e.g., A5-A6, A9-A11.)

Petitioner's "Questions Presented" twists this issue in two significant regards.

First, Petitioner cites authority concerning leafletting activity in governmentally controlled forums that are substantially different in character and purpose from Respondents' shopping center parking lot – e.g., public stadiums and convention centers, state prisons, train stations, and public airports. See, e.g., *Carreras v. City of Anaheim*, 768 F.2d 1039, 1041-1042 (9th Cir. 1985); *Prisoner's Union v. California Department of Corrections*, 135 Cal.App.3d 930, 185 Cal.Rptr. 634 (1982); *In re Hoffman*, 67 Cal.2d 845, 64 Cal.Rtpr. 97 (1967).

Petitioner ignores the fact that Respondents' shopping center is privately funded, owned and managed; simply put, it is private property. Accordingly, Respondents have "important rights of substance; those rights are identified as freedom from disruption of normal business operations and freedom from interference with customer convenience." *H-CHH Associates v. Citizens for Representative Government*, 193 Cal.App.3d 1193, 1200 (1987). Respondents' *parking lot* is *not* a public forum.

Petitioner erroneously concludes that simply because leafletting has been permitted under the facts and circumstances of those cases involving established public forums, that he has automatic rights to exercise similar leafletting activities in Petitioner's privately-owned parking lot, without regard to Respondents' time, place and manner regulations. Petitioner overlooks the reality that time, place and manner regulations on protected speech activity may be invalid under the facts and circumstances of one case involving one forum, yet be entirely valid under other circumstances at other public, quasi-public or private forums. See, e.g., *Heffron v. Int'l. Soc. for Krishna Consc.*, 462 U.S. 640, 652-653, 69 L.Ed.2d 298, 101 S.Ct. 2559 (1981).

This leads to Petitioner's second flaw. Petitioner claims that there was "no evidence" supporting the lower courts' determination that the time, place and manner regulations in the instant case were reasonable. As noted above, this is belied by the Court of Appeal's detailed inquiry into the factual showings made by the parties, as well as its determination that Respondents' parking lot leafletting ban has been uniformly applied and is "content free."[4]

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[4] Question Presented No. 1 in the Petition would seem to suggest that there was some evidence in the record that other parties were allowed to engage in leafletting in Respondents' parking lot. In fact, the courts below found no such evidence.

5. The California Courts Correctly Decided That the Trial Court Judge Need Not be Disqualified.

In view of the fact that Questions Presented 3.-5. clearly do not warrant review by this Court, Respondents will not brief them. However, Respondents request leave to file a brief on these Questions Presented, if the Court wishes to see one.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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